Supreme Court, U.S.
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No. 93-198

In The

Supreme Court of the United States

October Term, 1993

HUGH R. HALL,

Petitioner,

v.

ASSOCIATED DOCTORS HEALTH AND LIFE INSURANCE CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the standard for appellate review of the denial of a motion for judgment notwithstanding the verdict, which is unanimously and uniformly applied by the circuit courts and which was properly applied by the Court of Appeals in the case at bar, should be abandoned in cases in which there is an allegation of constructive discharge?

RULE 29.1 STATEMENT

Comes now Respondent and, pursuant to Rule 29.1, provides the following information:

Associated Doctors Health And Life Insurance Company is an Alabama corporation which is a wholly-owned subsidiary of Internationale Nederlanden America Life Corporation, a Georgia corporation. Ultimately, Internationale Nederlanden America Life Corporation is owned by Internationale Nederlanden Group, whose depositary receipts are traded on certain European Exchanges.

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9 WRIGHT & MILLER, Federal Practice and Procedure: Civil § 2524, p. 543 (1971) 9

STATEMENT OF THE CASE.

Petitioner Hugh Hall ("Hall") filed suit against Associated Doctors Health And Life Insurance Company ("Associated Doctors") claiming that he had been constructively discharged in violation of the Age Discrimination In Employment Act, 29 U.S.C. § 621, et seq. The case was tried to a jury beginning October 28, 1991, the Honorable Thomas W. Phillips, Magistrate, presiding by consent of the parties. At the close of Hall's evidence and again at the close of all of the evidence, Associated Doctors moved for a directed verdict. These motions were denied. The jury returned a verdict in favor of Hall on special interrogatories. Thereafter, Associated Doctors filed a post-trial motion for judgment notwithstanding the verdict ("n.o.v.") and new trial, both of which were denied. Associated Doctors appealed the denial of its motions to the Court of Appeals for the Sixth Circuit. The Court of Appeals determined, as a matter of law, that on the evidence presented, no reasonable jury could find that Hall had been constructively discharged, and that Associated Doctors was entitled to a judgment n.o.v. The Court of Appeals denied Hall's Petition For Rehearing En Banc on May 12, 1993. On August 6, 1993, Hall filed his Petition For Certiorari which was received by counsel for Associated Doctors on August 9, 1993.

COUNTERSTATEMENT OF FACTS.

Hall voluntarily resigned his employment with Associated Doctors at age 47. Hall was not threatened with discharge, urged to resign, demoted, or involuntarily

transferred. Associated Doctors did not reduce his compensation, benefits, alter his job responsibilities, or give him unsatisfactory performance evaluations. Hall resigned because he did not receive a promotion and Associated Doctors refused to increase his compensation to the amount Hall demanded.

Hall, the District Manager of Associated Doctors' Knoxville District, wanted to move to Florida.[1] In May 1987, Associated Doctors' Regional Manager for Florida resigned. Associated Doctors offered this position to James L. Banks, 56 years of age, a District Manager whose office led the Company with a 20% growth in premiums. Banks declined the offer. Associated Doctors then offered the position to Orville Bray, 39, another District Manager whose district had the second highest increase (16%) in premiums. Bray accepted the offer. Hall was not offered the position of Regional Manager based on his performance and that of his district. In contrast to the substantial growth in the premiums in the districts of Banks and Bray, the premiums in Hall's district had decreased by 14%.

Thereafter, in late May 1987, Wilbur Gaddy ("Gaddy"), Assistant Agency Director, and Hall spoke about Hall's becoming the District Manager of the Tampa office. Hall told Gaddy he would do so if Associated Doctors increased his monthly compensation "guarantee" to $3,000 per month. At the time, based on the performance of Hall's District, Hall had a "guarantee" of only

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[1] Indeed, as early as February 1987, Hall informed his superior that his wife had "found us a home" in Florida, and "we're going to Florida."

$1,900 per month. Gaddy, who had been Assistant Agency Director for only eight months and did not have the authority to increase Hall's guarantee, told Hall "I don't think that will be a problem." Deeming this to be a promise, Hall placed his homes in Knoxville up for sale.

Artificially increasing Hall's "guarantee," however, was a problem because Associated Doctors' policy was to maintain a district manager's "guarantee" at its current level when a transfer to another district occurred. Shortly after Hall spoke with Gaddy, Gaddy conferred with Marion McTyre ("McTyre"), President, and Ted Lane ("Lane"), Agency Director, about Hall's request that his guarantee be increased. Both Lane and McTyre told Gaddy that increasing Hall's guarantee was not in keeping with Associated Doctors' policy of continuing a district manager's existing guarantee when he moved to a new district. McTyre did agree to increase Hall's "guarantee" to $2,000 if he decided to become the District Manager in Tampa. This was communicated to Hall on June 3, 1987.

That evening Hall called McTyre, with whom he had met and spoken only one time and with whom he had no discussions about moving to Florida. After a heated discussion, Hall resigned his employment. Hall testified that during the discussion, he told McTyre why he needed a $3,000 guarantee. McTyre told Hall $2,000 per month was all Associated Doctors could do. Hall testified "I told him that I was not going to work for him, if that is the way he was going to conduct business." According to Hall, McTyre said "that is too bad." Hall testified he then asked McTyre "what do you want me to do?" and McTyre

replied "turn in your keys."[2] Hall left a note for the agents assigned to the Knoxville Office in which he stated "I have resigned as of June 3, 1987. . . . " Hall testified he felt that not getting the additional $1,100 he had been "promised" by Gaddy was a "good reason to resign."

Hall misstates the facts concerning his telephone discussion with McTyre. (Pet. p. 13) Hall suggests he was seeking guidance about whether to stay in Knoxville[3] or transfer and, in that context, he asked McTyre what to do and McTyre responded "turn in your keys." That is not, however, what Hall testified. Only after Hall told McTyre he was not going to work for him did Hall rhetorically ask McTyre "what to do."

Associated Doctors presented clear, unrefuted testimony that Hall's age was not a factor in its decisions. McTyre and Lane testified that age was not a factor in determining who should be offered the job of Regional Manager. No one testified that Hall's age was a factor in Associated Doctors' decision to promote someone other than him. Likewise, no one testified that Hall's age

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[2] McTyre's recollection of this discussion was much different. He testified that when he told Hall that Associated Doctors would only give him a guarantee of $2,000 per month, Hall replied "I quit, I resign, you will hear from my lawyer" and slammed down the phone. The Court of Appeals, reviewing the facts in the light most favorable to Hall, recites Hall's testimony regarding this discussion.

[3] In fact Hall testified he never brought up the option of his staying in Knoxville during the telephone discussion on June 3, 1987. McTyre testified he did not discuss this option because Hall abruptly and belligerently ended the conversation and never gave him an opportunity to do so.

played any part in Associated Doctors' decision not to increase Hall's guarantee in connection with accommodating his desire to move to Florida.[4]

SUMMARY OF ARGUMENT

The decision of the Court of Appeals is entirely consistent with decisions of other circuits in similar cases. Thus, the Writ should be denied. The Court of Appeals in this case properly applied universally recognized legal

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[4] The linchpin of Hall's claim of age discrimination was the testimony of Louis Noyd. Noyd's opinion, however, was based on nothing more than a simplistic, *ipso facto*, analysis: the American work force has increased in age; Associated Doctors' work force has declined in age; therefore, it follows that Associated Doctors had a policy of getting rid of older workers and hiring younger employees. Noyd completely overlooked that the average age of Associated Doctors' employees was almost 12 years higher than that of the American work force and he performed no test to determine whether any change in the average age of Associated Doctors' employees had any statistical significance. In the year Hall resigned, Associated Doctors hired a total of 32 new district managers, seventeen of whom were over 40, broken down as follows: 40-49 years of age-11; 50-59 years of age-5; 60 years and over-1. Nine of the new district managers were older than Hall and over 64% of Associated Doctors' entire work force was over 40.

Associated Doctors presented the testimony of Clarence L. Holland, Jr. ("Holland"), an expert, who performed three commonly used statistical tests – a regression analysis, analysis of variance and a chi square analysis – in examining Associated Doctors' work force. These tests demonstrated there was *no* statistical significance to changes in the average age of Associated Doctors' employees and no statistical evidence that age was a factor in the Company's employment decisions.

principles in a manner entirely consistent with decisions in other circuits. Through a series of mischaracterizations, misstatements, omissions and obfuscation, Hall seeks to create a "Serbonian bog" where currently no disagreement even exists. There is no dispute amongst the circuits regarding the appropriate standard of review which is to be used in examining a trial court's denial of a motion for judgment notwithstanding the verdict. Nor can there be any suggestion that the Court of Appeals for the Sixth Circuit deviated from the universally accepted standard in deciding the case at bar.

Literally all of Hall's arguments and citations regarding the standard of appellate review deal with the standard applicable to an appellate court's examination of findings of fact entered by a trial court pursuant to Rule 52 when trying a case without a jury. The case at bar was not tried to the court sitting without a jury but, instead, was tried to a jury. The issue on appeal was whether there was sufficient evidence to allow the case to be decided by the jury, not whether findings of fact entered by the court were erroneous. The standard of review applicable to bench trials is wholly irrelevant.

Likewise, the circuits agree on what constitutes a constructive discharge. If an employer creates or tolerates working conditions which are so offensive and unreasonable that a reasonable employee would feel compelled to resign, a constructive discharge is in the picture. Associated Doctors simply failed to promote Hall to a position he wanted and, although willing to accommodate his moving to Florida, refused to arbitrarily increase his compensation as Hall demanded. By these actions, Associated Doctors did not render Hall's working conditions so

offensive or unreasonable that a reasonable employee would feel compelled to resign. Therefore, as a matter of law, there was insufficient evidence to allow a jury to decide this case and Associated Doctors was entitled to judgment. The Court of Appeals' entry of judgment for Associated Doctors thus was appropriate. There is no basis on which to grant the Writ and it should be denied.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED THE UNIVERSALLY ACCEPTED STANDARD FOR REVIEWING A TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Hall seeks to have this Court overlook the fact that the case at bar was decided on Associated Doctors' appeal from the denial of its motion for judgment notwithstanding the verdict. Indeed, Hall fails even to mention the standard of appellate review which is universally used in examining the denial of a motion for judgment n.o.v. Instead, Hall discusses at length the standard of review which is used when an appellate court reviews the findings of fact of a trial court sitting without a jury. Obviously, this standard of review has nothing to do with the case at bar.

Hall states that most circuits apply the "clearly erroneous standard to the issue of constructive discharge." (Pet. p. 22) This statement is inaccurate and misleading. No circuit applies the "clearly erroneous" standard to the issue of constructive discharge when deciding whether

the evidence was sufficient to allow a jury to decide the case. The clearly erroneous standard is used only when reviewing the findings of a trial court sitting without a jury. The cases cited by Hall to support his claim do not involve the determination of whether the evidence was sufficient to get the case to a jury. They involve appeals from findings entered by a district court trying a case without a jury.[5] Rule 52(a)[6] of the Federal Rules of Civil Procedure establishes the clearly erroneous standard as the appropriate standard for reviewing findings of fact

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[5] Each of the Fifth Circuit cases cited by Hall on pages 21 and 22 of the Petition deal with the standard of review of findings of fact entered by a trial court sitting without a jury. *See e.g., Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted in part*, ___ U.S. ___, 113 S. Ct. 1250, 122 L.Ed.2d 64 (1993) (certiorari granted only on the issue of whether the Civil Rights Act of 1991 is to be applied retroactively); *Cortes v. Marcus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992). In both *Landgraf* and *Cortes*, the Court of Appeals concluded that the determination by a trial court, sitting without a jury, as to whether a constructive discharge has occurred is a question of fact subject to review under the clearly erroneous standard required by Rule 52(a), Federal Rules of Civil Procedure. Neither case deals with issues which are pertinent to the case at bar.

[6] Rule 52 provides in pertinent part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . .
>
> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
>
> Rule 52(a), Fed. R. Civ. Proc.

entered by a trial judge. Rule 52(a) and the clearly erroneous standard have nothing whatsoever to do with an appellate court's review of a motion for judgment n.o.v.

The issue presented to the Court of Appeals in the case at bar was whether Hall's evidence was sufficient to get the case to a jury. "Whether the evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court. [fn] [The standard in passing on that question] is the same in the trial court and on appeal. [fn]" 9 WRIGHT & MILLER, Federal Practice and Procedure: Civil § 2524, p. 541 (1971). A scintilla of evidence is not enough nor must the record be devoid of any evidence to support the verdict. The issue is "whether there is evidence upon which the jury could properly find a verdict for that party [in whose favor the verdict is rendered]." 9 WRIGHT & MILLER, Federal Practice and Procedure: Civil § 2524, p. 543 (1971). The recognized standard for determining this issue has been stated by this Court.

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial court, the result is saved from the mischance of speculation over legally unfounded claims.

Brady v. Southern Railway Co., 320 U.S. 476, 479-80, 64 S. Ct. 232, 234-35, 88 L.Ed. 239 (1943). The principle articulated by this Court is universally applied, although the appellate courts have sometimes used slightly different

language to describe it. *See, e.g., Ortega v. Schramm*, 922 F.2d 684, 694 (11th Cir. 1991); *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265 (6th Cir. 1986), *cert. denied*, 480 U.S. 919, 107 S. Ct. 1375, 94 L.E.2d 690 (1987); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013-14 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059, 106 S. Ct. 802, 88 L.E.2d 778 (1986). The standard of appellate review of a motion for judgment n.o.v. is no different when an alleged constructive discharge is at issue. *See, e.g., Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1526-27 (11th Cir. 1991); *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1153 (10th Cir. 1990); *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 49 (6th Cir. 1985); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L.Ed.2d 718 (1986); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983).

In the case at bar, the Court of Appeals for the Sixth Circuit applied the universally recognized standard in reviewing the denial of Respondent's motion for judgment n.o.v.

> To review a denial of motion for judgment notwithstanding the verdict, or j.n.o.v., we apply the same standard applied by the District Court in denying the motion. *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). In doing so, we view the evidence in the light most favorable to the party opposed to the motion and draw all reasonable inferences in favor of that party. *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 154 (6th Cir. 1988). However, judgment notwithstanding the verdict is appropriate when "the court finds that the evidence points so strongly in favor of

> the movant that reasonable minds could not come to a different conclusion." *Chappell*, 803 F.2d at 265.

Hall v. Associated Doctors Health And Life Ins. Co., Pet. For Cert. App. A-61 & A-62.

Hall grossly and completely mischaracterizes the decision of the Court of Appeals in the case at bar. Petitioner claims the court "re-interprets the facts," (Pet. p. 20) "weighe[d] the conflicting evidence, judge[d] the credibility of witnesses and arrive[d] at a conclusion opposite the one reached by the jury." (Pet. p. 28). These mischaracterizations are insupportable. Nowhere does the Court of Appeals suggest that it determined the credibility of the witnesses, weighed competing evidence, reinterpreted the facts or simply disagreed with the jury. Instead, it recites the facts in the light most favorable to Hall and simply concludes that, based on these facts, reasonable minds cannot conclude Hall was constructively discharged.[7]

Hall's claim that the Sixth Circuit has changed the standard of review "from case to case and even within a

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[7] Hall's criticism of the Court's statement of the facts is unfounded. For instance, Hall suggests the Court of Appeals reinterpreted the facts when it characterized his demand to arbitrarily increase his guarantee as a request for a "raise." (Pet. p. 20, n.1) Can it be characterized as anything else? Based on the performance of Hall's office for the preceding three months, his "guarantee" was $1,900. Yet, he wanted a guarantee of $3,000 per month, an increase of $1,100. That his guarantee in earlier years might have been higher is irrelevant. Hall's other examples of the alleged reinterpretation of facts are similarly inaccurate.

case with the result that there is much confusion surrounding the issue of standard of review in a constructive discharge case" (Pet. pp. 28-29) likewise is inaccurate and misleading. The Sixth Circuit has not changed the standard for reviewing the denial of a motion for judgment n.o.v. in constructive discharge cases. In *Williams v. Caterpillar Tractor Co.*, 770 F.2d 47 (6th Cir. 1985), a case involving the denial of a motion for judgment n.o.v., the Sixth Circuit applied exactly the same standard of appellate review as it applied in the case at bar. Hall cites no Sixth Circuit case dealing with a motion for judgment n.o.v. in which the Court of Appeals has used any standard other than the one it applied in the case at bar.

Hall fails to discuss the standard of review applicable in cases like that at bar in an apparent attempt to create the false impression that the holding in the case at bar is in conflict with that of some other circuit. However, the decision in the case at bar is in complete accord with those in other circuits. Associated Doctors acknowledges that appellate courts, when examining a trial court's findings of fact, have applied different levels of scrutiny depending on whether a finding of constructive discharge is deemed a fact or a mixed question of law and fact. However, since the standard of review applicable to a decision by a trial court sitting without a jury is inapplicable to the case at bar, any disagreement amongst the circuits regarding how to treat a trial court's finding of constructive discharge is of no consequence to this case.[8]

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[8] Contrary to Hall's statement at page 22 of the Petition, the Court of Appeals for the Third Circuit in *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159 (3d Cir. 1993), did not adopt the

There is no conflict between the decision of the Court of Appeals and that of any other circuit regarding the proper standard of appellate review and the Court of Appeals properly applied the accepted standard of review. Therefore, the Writ should be denied.

II. THE COURT OF APPEALS FOLLOWED WELL-ESTABLISHED PRECEDENT IN CORRECTLY DECIDING, AS A MATTER OF LAW, THAT HALL'S WORKING CONDITIONS WERE NOT MADE SO UNREASONABLE OR OFFENSIVE THAT A REASONABLE EMPLOYEE WOULD HAVE BEEN COMPELLED TO RESIGN.

Hall attempts to create the false impression that a conflict exists between the decision at bar and those rendered by other circuits dealing with constructive discharge. There is no disagreement among the circuits regarding what constitutes a constructive discharge.

> A constructive discharge exists if 'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' [Cit.]

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clearly erroneous standard for reviewing the denial of a judgment n.o.v. in a constructive discharge case. Instead, the court simply concluded "[E]ven if subject to review only for clear error, the district court's holding that Clowes was constructively discharged cannot be sustained." 991 F.2d at 1161.

Yates v. AVCO Corp., 819 F.2d 630, 636-37 (6th Cir. 1987).[9] *See also, Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991); *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir. 1982); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L.Ed.2d 718 (1986); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922-23 (3d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1310, 113 L.Ed.2d 244 (1991); *Bartram v. Allis-Chalmers Corp.*, 799 F.2d 311, 314 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092, 107 S. Ct. 1304, 94 L.Ed.2d 160 (1987); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). Discriminatory conduct on the part of the employer, alone, is insufficient to cause a constructive discharge. *See e.g., Pitts v. Michael Miller Car Rental*, 942 F.2d 1067, 1072 (6th Cir. 1991); *Boze v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990); *Jurgens v. Equal Employment*

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[9] In addition to this requirement, two circuits, the Fourth and the Eighth, require that an employer intend to force the employee to resign. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1461, 89 L.Ed.2d 718 (1986); *Johnson v. Bunny Bread*, 646 F.2d 1250, 1256 (8th Cir. 1981). In the case at bar, the Court of Appeals did not require Hall to prove this, nor has it required such proof in other cases. *See Yates v. AVCO Corp.*, 819 F.2d 630 (6th Cir. 1987). The Court of Appeals for the Sixth Circuit sits squarely with the weight of authority on this issue. *See e.g., Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992). Moreover, since Hall could not prove that his working conditions were so offensive or unreasonable that a reasonable employee would have been compelled to resign, the issue of Associated Doctors' intent is irrelevant.

Opportunity Commission, 903 F.2d 386, 392 (5th Cir. 1990); *Wardwell v. School Bd. of Palm Beach County, Florida*, 786 F.2d 1554, 1558 (11th Cir. 1986). Instead, there must be "aggravating circumstances" such as ongoing mistreatment or harassment, usually over a prolonged period of time, which makes the employee's working conditions so offensive or unreasonable as to compel the employee to resign. *See e.g., Easter v. Jeep Corporation*, 42 F.E.P. Cases 666, 668 (6th Cir. 1984); *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 749-50 (3d Cir. 1990); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989); *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981).

Hall claimed that two events combined to cause him to resign: (1) Associated Doctors' failure in May 1987 to promote him to the position of Regional Manager in the State of Florida; and (2) Associated Doctors' reneging on Gaddy's "promise" to pay him a "guarantee" of $3,000 if he moved to Tampa as a District Manager. Hall was never threatened with discharge nor urged to resign. Hall was not demoted,[10] involuntarily transferred to another position or office, or given unsatisfactory job reviews. Nor did Associated Doctors cut his pay or change his job responsibilities in any way. Associated Doctors simply failed to promote Hall and, later, while willing to accommodate his desire to move to Florida, was unwilling to accede to the terms of Hall's demand for an increase in

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[10] Hall's statement that "Hall received the *demotion*. . . . " (Pet. p. 41) is a misstatement. Respondent assumes Petitioner meant to say that "Hall did not receive the promotion" because, while Hall was not promoted, Hall was not demoted. He was a District Manager in Knoxville and, had he chosen to move, he would have been a District Manager in Tampa.

compensation. Petitioner cites no case in which similar facts have been held sufficient to create an issue of constructive discharge, nor has one been found.[11]

Indeed, in cases with facts far more compelling than those presented here, appellate courts have found no constructive discharge as a matter of law. For instance, in *Katradis v. Dav-El of Washington, D.C.*, 846 F.2d 1482 (D.C. Cir. 1988), plaintiff, unable to work for a period of time because of cancer, was promised he would be returned to his job at the same salary. Instead, plaintiff was reemployed at a reduced salary in a bookkeeping position for which he was not qualified. Plaintiff resigned when given an "ultimatum" to take a bookkeeping course at his own expense or be fired. The Court of Appeals for the District of Columbia affirmed the grant of summary judgment for the defendant on the ground there was no evidence from which a reasonable jury might find a constructive discharge.

In *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518 (11th Cir. 1991), plaintiff was reprimanded, threatened with a

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[11] Hall argues that this Court should create a bright line test of " 'how much is enough' to show constructive discharge." (Pet. p. 47) However, whether there has been a constructive discharge "turns on the facts of each case." *Satterwhite v. Smith*, 744 F.2d 1380, 1382 (9th Cir. 1984). Thus, the determination of whether an employee's working conditions have been rendered so unreasonable as to compel him to resign depends on the circumstances and is not subject to the imposition of a bright line test. In this regard, constructive discharge cases present no special problems which render them different from other cases in which the issue is whether there was sufficient evidence to allow the case to reach the jury.

reduction in her position, repeatedly criticized and had all of her supervisor's support withdrawn. In the face of this harassment and intimidation, plaintiff resigned. The trial court granted defendant's motion for judgment n.o.v. from a jury verdict in plaintiff's favor. The Court of Appeals for the Eleventh Circuit affirmed finding there had been no constructive discharge.

In *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980), the defendant made numerous discriminatory remarks to the plaintiff, discriminated against plaintiff because of her sex and reneged on a promise to increase plaintiff's salary. The Fifth Circuit Court of Appeals determined that plaintiff's working conditions had not been made "so difficult or unpleasant, that a reasonable person would have felt compelled to resign." 617 F.2d at 65.

Hall wanted to be promoted to the position of Regional Manager in Florida. Associated Doctors promoted someone else. Hall wanted a significant increase in his guarantee and claims Gaddy promised that such an increase would be "no problem." Associated Doctors was unwilling to increase Hall's guarantee by the amount Hall demanded. No reasonable jury could have concluded that Hall was constructively discharged by Associated Doctors and the Court of Appeals correctly concluded that Associated Doctors was entitled to a judgment notwithstanding the verdict reached by the jury. There has been no departure from a reasoned application of the well-established principles of law regarding constructive discharge. Thus, there is no reason to grant the Writ.

III. THE CASE AT BAR IS NOT SIMILAR TO HARRIS V. FORKLIFT SYSTEMS, INC.

Petitioner's claim that *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, ___ U.S. ___, 113 S. Ct. 1382, 122 L.Ed.2d 758 (1993), No. 92-1168 (March 1993), is similar to the case at bar is incorrect. *Harris* is a hostile environment case brought under Title VII of the Civil Rights Act of 1964 in which the issue presented for review is whether plaintiff, in order to prevail on her claim of sexual harassment, must prove she suffered "serious psychological injury" in addition to demonstrating "she was offended by conduct that would have offended a reasonable person." (Pet. For Cert., No. 92-1168, p.i). *Harris* has nothing to do with the standard of review applicable to the denial of a motion for judgment n.o.v. nor any concocted suggestion that there is any disagreement amongst the circuits over what constitutes a constructive discharge. In short, the issues presented in *Harris* are not pertinent to the case at bar.

CONCLUSION

The Court of Appeals, applying universally recognized and accepted legal principles, correctly determined that Associated Doctors' failure to promote Hall and refusal to increase his "guarantee" did not render Hall's working conditions so offensive or unreasonable that a reasonable employee would have felt compelled to resign. The Court of Appeals' standard of review and opinion are entirely consistent with decisions rendered

by other circuits in similar circumstances. Consequently, the Writ should be denied.

Respectfully submitted,

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